

1 THE HONORABLE RICHARD A. JONES  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 ZENWORK, INC. f/k/a TECHATLANTIS, INC., Plaintiff, v. AVALARA, INC., Defendant. ) Case No. C16-1325 RAJ  
11 ) PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR ORDER TO SHOW CAUSE OR IN THE ALTERNATIVE FOR PRELIMINARY INJUNCTION  
12 ) ORAL ARGUMENT REQUESTED  
13 ) NOTED: JANUARY 6, 2017  
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16 I. INTRODUCTION

17 Before the Court is a motion for an Order to Show Cause or In the Alternative for  
18 Preliminary Injunction by Defendant and Counterclaim Plaintiff, Avalara, Inc. ("Avalara"). The  
19 motion seeks the return of property by asserting a Washington cause of action for replevin. The  
20 motion should be denied. Avalara's request, while appearing simple on its face, is an attempt to  
21 force a small growing company to use its limited resources to service Avalara's customers  
22 without payment and without legal justification during the busy tax season. Avalara also fails to  
23 even acknowledge to the Court that it never plead a claim for replevin against TechAtlantis,  
24 Inc. ("TechAtlantis") while at the same time arguing that it is likely to succeed on the merits of  
25 that claim.

26 Avalara does not seek the return of property in the form of customer data. It wants  
27 TechAtlantis to develop a program that will allow it to create and produce numerous documents  
RESPONSE TO MOTION FOR ORDER  
TO SHOW CAUSE OR PRELIMINARY  
INJUNCTION - 1

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1 required by a third-party customer of Avalara: H&R Block (“HRB”). The format for the  
 2 “returned” data that Avalara seeks would require TechAtlantis to devote hundreds of hours  
 3 during its busy tax season to develop a program to meet the very specific demands from  
 4 Avalara for the benefit of Avalara’s customers. The contract at issue in this motion does not  
 5 require TechAtlantis to do this additional work.

## 6 II. FACTUAL BACKGROUND

### 7 A. The Agreement

8 On November 14, 2014, the parties entered into the Reseller Agreement (“Agreement”)  
 9 that is the basis of TechAtlantis’s claims against Avalara. Complaint (Dkt. #1), Ex. A and  
 10 Kushniruk Decl. (Dkt. #19), Ex. A. The purpose of the Agreement was to use TechAtlantis’s  
 11 proprietary tax product called Tax1099, which is an IRS-approved E-file provider for 1099 and  
 12 other tax forms, for the benefit of Avalara’s customers and marketed under Avalara’s brand.  
 13 Declaration of Ed Pratt (“Pratt Decl.”), ¶ 2. TechAtlantis developed a private-labeled version of  
 14 its Tax1099 product called Avalara1099. Pratt Decl., ¶ 7. Pursuant to the Agreement,  
 15 TechAtlantis agreed to create and operate the Avalara-branded web-based 1099 service during  
 16 the term of the Agreement. Pratt Decl., ¶ 6; Kushniruk Decl., Ex. A, Recital C and ¶ 2.1.  
 17

18 The Agreement required that Avalara1099 be hosted on a separate platform and that it  
 19 be kept entirely separate from TechAtantis’s Tax1099 product. *See* Kushniruk Decl., Ex. A, ¶¶  
 20 2.5 & 3.1. The Agreement also required that Avalara have “real time” access to all customer  
 21 data on the Avalara1099 platform. *Id.* at ¶ 3.1. At all times during the course of the Agreement,  
 22 Avalara has had real-time access to the AVA Data. Pratt Decl., ¶ 7. TechAtlantis never  
 23 withheld any customer data from Avalara. *Id.*

24 At the heart of this dispute is one of Avalara’s largest customers, HRB. At the time the  
 25 parties entered into the Agreement, however, HRB was not a customer of Avalara or  
 26

1 TechAtlantis. Pratt Decl., ¶ 11. TechAtlantis has never had an agreement of any kind with  
 2 HRB. *Id.* TechAtlantis believes that Avalara entered into an agreement with HRB sometime in  
 3 September 2015. *Id.* The HRB business resulted in a substantial increase in the volume of  
 4 business to Avalara<sup>1099</sup>. *Id.* at ¶ 12.

5           **B. TechAtlantis Terminates the Agreement for Nonpayment**

6           From the beginning of the Agreement, Avalara was slow to pay TechAtlantis for work  
 7 it performed under the Agreement. The lack of payment by Avalara was made worse by the  
 8 fact that TechAtlantis was required to front the costs of postage and e-filing for Avalara's  
 9 customers and it was not being reimbursed in a timely manner, if at all. Pratt Decl., at ¶¶ 13-14.  
 10 By January 2016, it was impossible for TechAtlantis to continue to service Avalara's customers  
 11 in the face of Avalara's delinquent payment obligations. TechAtlantis notified Avalara that it  
 12 was terminating the Agreement. *Id.*, Ex. A. TechAtlantis was clear that its hope was that the  
 13 parties could renegotiate the Agreement to address other payment options so that it did not have  
 14 to constantly be chasing down payment on invoices from Avalara. *Id.* During the term of the  
 15 Agreement, TechAtlantis had invoiced Avalara for more than \$900,000 in fees and costs and  
 16 had only been paid approximately \$31,200 by Avalara. Pratt Decl., ¶ 13.

17           **C. Parties Begin the Wind-Down Period**

18           Per the Agreement, TechAtlantis's termination notice triggered a six-month Wind-  
 19 Down Period. Kushniruk Decl., Ex. A, ¶ 10. The parties contemplated that, upon termination of  
 20 the Agreement, Avalara and its customers would need time to download their data before  
 21 access to the site was shut down. Pratt Decl., ¶¶ 9;15. That was the express purpose of the six-  
 22 month Wind-Down Period. Singh Decl., ¶ 7; Pratt Decl., ¶ 9; Kushniruk Decl., Ex. A, ¶ 10.3.3.  
 23 During the Wind-Down Period neither party was to accept new accounts and the parties were to  
 24  
 25  
 26  
 27

1 ensure that “[Avalara] Customers [were] able to retrieve their data from Avalara1099.”

2 Kushniruk Decl., Ex. A, ¶ 10.3.3.

3 TechAtlantis continued to provide access and support to Avalara and its customers  
 4 throughout the term of the Wind-Down Period which expired on September 30, 2016. Pratt  
 5 Decl., ¶ 15. The Wind-Down Period included an obligation that Avalara continue to pay for the  
 6 services provided by TechAtlantis. Kushniruk Decl., Ex. A, ¶ 10.3.7. Avalara continued to  
 7 refuse to make payments on the outstanding invoices or to pay TechAtlantis during the Wind-  
 8 Down Period. Pratt Decl., ¶ 16. TechAtlantis continued to provide access and support to  
 9 Avalara’s customers, and Avalara continued to pay nothing. *Id.* at ¶ 15-16.

10 In July 2016, even before the Avalara1099 site was shut down, TechAtlantis received  
 11 correspondence from an attorney for HRB making a demand for information associated with  
 12 Avalara1099 that it wanted formatted in a very specific manner. Pratt Decl., Ex. B (HRB  
 13 “demands the following Client Data be returned immediately in the specified format . . .”).  
 14 Counsel for TechAtlantis responded to HRB, explaining that Tech Atlantis had no idea what  
 15 obligations Avalara had to HRB, as it was not a party to their contract, and that it was  
 16 impossible to “return” the data in the format demanded, because doing so would require  
 17 additional development work. Clark Decl., Ex. A. Counsel for TechAtlantis explained to HRB  
 18 that Avalara had full access to all of HRB’s customer data, and that any obligation to produce it  
 19 in a format required by HRB was between Avalara and HRB. *Id.*

20 **D. TechAtlantis Extends the Wind-Down Period an Additional Thirty-Days**

21 In October 2016, after Avalara’s first threat to bring an injunction motion against  
 22 TechAtlantis for the “return of customer data,” TechAtlantis agreed to reinstate the  
 23 Avalara1099 site to the condition it was in prior to the expiration of the Wind-Down Period, for  
 24

1 the sole purpose of allowing Avalara and its customers to access and download any information  
 2 they needed. Pratt Decl., ¶ 19-20; Singh Decl., ¶ 11-12. TechAtlantis's good faith efforts were  
 3 for naught. After the expiration of the thirty-day window, Avalara continued to make demands  
 4 for information and documents it could have obtained during open-access window. Singh  
 5 Decl., ¶ 12. Once again, Avalara requested more documents and data from TechAtlantis. After  
 6 the last request, TechAtlantis informed Avalara that it could not respond to additional requests  
 7 during the tax season beginning on January 1, 2017, because it does not have the manpower to  
 8 devote to Avalara's demands. Singh Decl., ¶ 13. Moreover, Avalara's non-payment of almost a  
 9 million dollars created a serious hardship for TechAtlantis. *Id.* Avalara's lack of diligence  
 10 during the Wind-Down Period and the thirty-day window, created the problems it is now  
 11 experiencing.  
 12

### 13                   III.    LEGAL ANALYSIS

14                   Avalara styles this motion as simply one for the return of customer data. Avalara's  
 15 demands go far beyond accessing the site and "returning" data, however. It is demanding that  
 16 TechAtlantis create specific documents for each of Avalara's customers in specific forms that  
 17 do not exist. Singh Decl., ¶ 5. It appears that Avalara is attempting to impose obligations it has  
 18 to its customer, HRB, on TechAtlantis. Pratt Decl., Ex B; Brown Decl., Ex A. For example,  
 19 HRB has demanded .csv and pdf files for each of its customers. *Id.* But there are no .csv files or  
 20 pdfs stored on the Avalara1099 site nor are there "forms" in the possession of TechAtlantis to  
 21 be "returned." Singh Decl., ¶¶ 5- 6. Providing the information in the format demanded would  
 22 require hundreds of programming hours. Singh Decl., ¶ 9. Additionally, the format of data that  
 23 Avalara is demanding would require dismantling the security systems that where designed into  
 24 the system to specifically ensure the confidentiality of sensitive client data. *Id.*, ¶¶ 9-10. Were  
 25

1 such data to be compromised, TechAtlantis would potentially be liable for a security breach.

2 *Id.*, ¶¶ 9-10; 17. The raw data without the proprietary code developed by TechAtlantis (i.e., the  
 3 service it provided under the Agreement) would be indecipherable to Avalara and its  
 4 customers. Singh Decl., ¶ 8. The demand by Avalara is well outside the scope of anything  
 5 contemplated by the parties when entering into the Agreement.

6 More importantly, as discussed below, Avalara's demands in the form of a Court  
 7 ordered injunction based on a claim of replevin has numerous procedural, factual and legal  
 8 insufficiencies.

9

10 **A. Preliminary Injunction Standard**

11 This is a motion for a preliminary injunction based on claim for replevin. For Avalara to  
 12 obtain preliminary relief, it must show that it is (1) likely to succeed on the merits of its  
 13 replevin claim; (2) that it is likely to suffer irreparable harm in the absence of preliminary  
 14 relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public  
 15 interest. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015) (citing  
 16 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). "Preliminary  
 17 injunctions are an 'extraordinary remedy never awarded as of right.' *Garcia v. Google, Inc.*,  
 18 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (quoting *Winter*, 555 U.S. at 24). Courts in the  
 19 Ninth Circuit employ a "sliding scale" approach to preliminary injunctions. *Alliance for the  
 20 Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "Under this approach, the  
 21 elements of the preliminary injunction test are balanced, so that a stronger showing of one  
 22 element may offset a weaker showing of another." *Id.*

23

24 **B. Likelihood of Success on Merits of Replevin Claim**

25 Whether the plaintiff is likely to succeed on the merits is the threshold inquiry. "[W]hen  
 26 'a plaintiff has failed to show the likelihood of success on the merits, [the court] need not  
 27

1 consider the remaining three *Winter* elements.”” *Garcia*, 786 F.3d at 740 (quoting *Ass’n des*  
 2 *Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013))  
 3 (internal quotations and alterations omitted). Avalara devotes a total of two sentences to its  
 4 argument that it is likely to succeed on the merits of its replevin claim. Mot. at 9:15-21. Avalara  
 5 then makes the odd argument that it is likely to succeed on the merits of its “claim for an order”  
 6 directing the return of its customer data. *Id.* at 9:23-24. While it is not clear what argument  
 7 Avalara is trying to make with the strength of the merits of its “claim for an order,” what is  
 8 clear is that Avalara has not met its threshold burden of showing that it is likely to succeed on a  
 9 replevin claim against TechAtlantis.

10           **I.       Avalara Did Not Plead Replevin**

11           In its counterclaims, Avalara asserts six claims against TechAtlantis: (1) breach of  
 12 contract and breach of warranty; (2) indemnification; (3) tortious interference with business  
 13 relationships; (4) conversion; (5) trademark infringement; and (6) unfair business practices.  
 14 None of which are based on a claim for replevin. Avalara’s claim for conversion against  
 15 TechAtlantis is based on allegations that TechAtlantis “intentionally, wrongfully and willfully  
 16 interfered with and appropriated the AVA Data.” Avalara’s Answer, Affirmative Defenses and  
 17 Counterclaims (Dkt. # 9), ¶ 77. A claim for conversion does not include one for replevin.  
 18 Pleading one does not include the other. This was made clear by the Supreme Court of  
 19 Washington over a hundred years ago. *Hall v. Law Guarantee & Trust Soc., Ltd., of London,*  
 20 *England*, 60 P. 643, 22 Wash. 305, 310 (1900) (“A claim for conversion is separate and distinct  
 21 from a claim for replevin.”).

22           Ignoring this fatal flaw to its preliminary injunction motion, Avalara nevertheless  
 23 argues to this Court that it is “almost certain to prevail on its claim for an order granting it  
 24 possession of the AVA Data under [a claim for replevin] RCW 7.64.010 *et seq.*” Mot. at 9  
 25 (Dkt. # 16). Yet, Avalara offers no explanation to the Court as to why it failed to assert a claim  
 26 for replevin in the first place or, once realizing its error, sought leave of Court to amend its  
 27 counterclaims pursuant to Federal Rule of Civil Procedure 15(a)(2). Avalara’s failure to assert a

1 viable claim as the basis for its preliminary injunction motion, even if other claims were  
 2 asserted in its counterclaims against TechAtlantis, requires that its motion be denied. As  
 3 explained in *Garcia*, although the plaintiff could have prevailed on other theories, such as the  
 4 tort claims plead in her complaint, she only sought an injunction on her copyright claim and  
 5 that is the claim that requires the Court to make a clear finding of likelihood of success. *See*  
 6 *Garcia*, 786 F.3d at 740-741.

7           **2.       Avalara Seeks Additional Unpaid Services from TechAtlantis**

8       Granting this injunction would require additional uncompensated work on the part of  
 9 TechAtlantis. Where a plaintiff seeks a preliminary injunction that alters the status quo and  
 10 orders a party to “take action,” courts construe such requests as seeking a mandatory injunction.  
 11 *Garcia*, 786 F.3d at 740. Mandatory injunctions are particularly disfavored and should be  
 12 denied “unless the facts and law clearly favor the moving party.” *Id.* As Judge McKeown wrote  
 13 in *Garcia*, when the proponent of an injunction is seeking the other party to “take affirmative  
 14 action” the burden of showing likelihood of success on the merits of its claim is “doubly  
 15 demanding.” *Garcia*, 786 F.3d at 740 (“In plain terms, mandatory injunctions should not issue  
 16 in ‘doubtful cases.’”) (citing *Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Trust*,  
 17 636 F.3d 1150, 1160 (9th Cir. 2011)). In *Garcia*, the injunction order granted by the district  
 18 court would have required Google to affirmatively monitor websites to ensure the plaintiff’s  
 19 video was not being displayed.  
 20

21       Avalara characterizes this motion as a failure to “return” data demanded after the  
 22 termination of the Wind-Down Period. In reality it is a demand for data that was promised to  
 23 HRB in a specific form by Avalara well before the Wind-Down Period. Pratt Decl., Ex. B. For  
 24 reasons unknown to TechAtlantis, Avalara did not or could not provide the data in the form  
 25 requested by HRB during the Wind-Down Period and is now trying to impose its affirmative  
 26

1 obligations to HRB on TechAtlantis. Avalara had full access to all customer data during the  
 2 six-month Wind-Down Period, and during the thirty-day period when the site was reinstated.  
 3 Pratt Decl., ¶¶ 7;9;17;19-20. Nothing has been withheld from Avalara. *Id.* at ¶ 7. TechAtlantis  
 4 does not know what data Avalara or its customers accessed and downloaded during this period.  
 5 Avalara is essentially demanding that any function that could ever have been performed in  
 6 Avalara1099 be duplicated and provided to it at TechAtlantis's cost and without compensation.  
 7 Granting Avalara's motion would force TechAtlantis to create intellectual property for Avalara  
 8 at no cost to Avalara, while imposing a burden on TechAtlantis that could literally drive it out  
 9 of business. Singh Decl., ¶¶ 9-10; 14-17. This form of mandatory injunction should be denied  
 10 as Avalara has not demonstrated that the facts and law favor its position, let alone that it  
 11 "clearly" favors its position.  
 12

### 13           3.       *The "Property" at Issue Cannot be "Physically Possessed"*

14       Even if Avalara had made a claim for replevin and even if that claim was likely to  
 15 succeed on its merits, the "personal property" at issue is data that is stored in the cloud owned  
 16 by a third-party not named in the lawsuit: Amazon. Because of the security protocols built into  
 17 Avalara1099, *see* Singh Decl., ¶ 10, in order to access and download the data an individual is  
 18 required to log into every account and download the information separately. This is the process  
 19 that Avalara and its customers were to use during the six-month Wind-Down Period.  
 20

21       Pursuant to RCW 7.64.010 only "personal property" is subject to replevin. As explained  
 22 by Professor Marjorie Dick Rombauer, University Of Washington School Of Law, "the  
 23 property must be tangible property capable of being physically possessed. Instruments such as  
 24 promissory notes and securities and other evidences of rights such as account passbooks or  
 25 deeds can be possessed for purposes of this requirement." 28 Wash. Prac. § 6.67.

26       The Court's order on replevin would have to direct the Sheriff to take possession of the  
 27 property and put the plaintiff in possession. RCW 7.64.035(2)(c). Then "[a]fter issuance of the

order awarding possession,” Avalara would have to “deliver a copy of the bond, . . . and a certified copy of the order awarding possession to the *sheriff of the county where the property is located* and shall provide the sheriff with all available information as to the location and identity of the defendant and the property claimed.” RCW § 7.64.045 (emphasis added). TechAtlantis does not know where Amazon Web Services are located but is aware that there are at least 15 geographical regions for Amazon Web Services, including many that are not in the United States.<sup>1</sup>

While the data that was entered into Avalara1099 by the customer is not owned by TechAtlantis, the intellectual property that compiles the data into forms that can be filed with the IRS is owned by TechAtlantis. There is no way to turn over the Amazon Web Service site to Avalara without also turning over the intellectual property that is the bread and butter of TechAtlantis’s business. Singh Decl., ¶ 8.

#### **4. State Procedures for Replevin**

Finally, the first element of a state law claim for replevin is that “the plaintiff is the owner of the property or is lawfully entitled to the possession of the property by virtue of a special property interest.” RCW 7.64.020(2). Although Avalara is correct that the raw data that was entered into Avalara1099 system is owned by Avalara or its customers, it is not seeking the return of that data. It is asking for data to be created, and created in a format that is not identified or defined anywhere within the terms of the Reseller Agreement.

The plaintiff seeking replevin must be able to prevail on the strength of her title or right, regardless of the defendant’s title or right to possession. *Crystal Recreation, Inc. v. Seattle Ass’n of Credit Men*, 34 Wn.2d 553, 558, 209 P.2d 358 (1949). Although Avalara cites to two federal court cases applying RCW 7.64.010 *et seq.* while exercising its diversity jurisdiction, the cases cited by Avalara do not address the novel issue of attempting to seize data from a cloud based service hosted by a third-party provider. In *Alliance Shippers, Inc. v. Always*

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<sup>1</sup> <https://aws.amazon.com/about-aws/> (last visited January 2, 2017) (“U.S., Europe, Brazil, Singapore, Japan, and Australia”)

1     *Transport, Inc.*, a case relied on by Avalara, an unpublished opinion, discussed whether the district  
 2 court erred in failing to award attorney's fees in a successful action for replevin of a shipping  
 3 trailer. *Alliance Shippers, Inc. v. Always Transport, Inc.*, 511 Fed. Appx. 678, 679 (9th Cir. 2013);  
 4 *Alliance Shippers, Inc. v. Always Transport, Inc.*, CV09-3126RMP, 2011 WL 4352310(E.D. Wash.  
 5 Sept. 16, 2011). The other federal case cited by Avalara, similarly applies a straight forward  
 6 analysis of the state law of replevin as it relates to insurance proceeds. *See In re Courson*, 409 B.R.  
 7 516, 530 (E.D. Wash. 2009). Neither case addresses how a Washington Court would apply the law  
 8 of replevin to data stored in the cloud and Avalara offers no state law authority addressing  
 9 replevin in a similar context.

10       This case does not involve such straightforward issues as the return of a trailer. In this  
 11 case, before the Agreement expired, Avalara and Tech Atlantis had equal access to the  
 12 customer data. Pratt Decl., ¶¶ 7;9. During the term of the Agreement, throughout the Wind-  
 13 Down Period, and during the thirty-day open access period, Avalara had the ability to access  
 14 and obtain all of the its customer data. Pratt Decl., ¶¶ 19-20; Singh Decl.,¶¶ 7; 11-13. At some  
 15 point, Avalara must be responsible for its own failures to perform.

16       The provision in the contract on which Avalara relies, Section 10.4, titled "Return of  
 17 Confidential Information" contemplates the return of any proprietary information that the  
 18 parties may have exchanged during the course of their business relationship. "Confidential  
 19 information" covered under this provision is extremely broad and includes "business and  
 20 technical information, trade secrets, source code, marketing plans" etc. Kushniruk Decl., Ex. A,  
 21 ¶ 1.7. Section 10.4 also includes the option to "certify as destroyed" the confidential  
 22 information. *Id.*, at 10.4.

23       The Wind-Down Period was specifically included so Avalara would have time to obtain  
 24 its data. Singh Decl.,¶ 7. Had the parties not been in litigation, the raw data in Avalara1099  
 25 would have been destroyed when the Wind-Down Period expired. Singh Decl., ¶ 8. The Wind-  
 26 Down Period was necessary for Avalara to access the customer data, but it would have to be  
 27

1 destroyed after the contract expired, because the raw data cannot be “returned” in any usable  
 2 form that does not include Tech Atlantis’ proprietary code. Singh Decl., ¶ 8.

3           **C. Irreparable Harm and Balance of Equities**

4 Avalara created its own harm by failing to access and download the customer data, in  
 5 the form it wanted, during the Wind-Down Period or during the subsequent thirty-day window.  
 6 It now wants TechAtlantis to do that work without compensation under the guise of a “return of  
 7 data” theory. A return of data is not what Avalara and HRB are demanding, however. They  
 8 demand that the data be turned into a form specific to their clients’ needs. *See* Pratt Decl., Ex. B  
 9 (July 8, 2016 Durone Letter stating that HRB wants the data returned in “immediately in a  
 10 specific format” including detailed .csv files and pdfs). As explained above, the data is not  
 11 stored on the Avalara1099 system in specific .csv or pdf files. *See* Singh Decl., ¶ 5. The .csv  
 12 files and pdf files are too large to be stored on the system so the Avalara1099 system only  
 13 stores the raw data and then uses its proprietary software to collect, organize and transmit that  
 14 data to the IRS in the form requested by the customer. *Id.* The Avalara1099 system does not  
 15 keep a copy of the form because of the storage space that would be required to do that would be  
 16 prohibitively expensive. *Id.* Tech Atlantis understands that this is the same model that Avalara  
 17 uses for its own customers and charges its customers for creating forms after the termination of  
 18 the subscription agreement. *Id.*

19           Also, TechAtlantis is a small business relative to both Avalara and HRB. Pratt Decl., ¶  
 20 21. It is imperative that TechAtlantis focus on its own business during the tax season and not be  
 21 responsible for producing forms for Avalara’s customers, especially considering that Avalara  
 22 already owes TechAtlantis approximately \$1 million for the work it performed in the past. *Id.*  
 23 at ¶ 13.

24           Tech Atlantis has already performed significant work it was not obligated to perform in  
 25 order to accommodate both Avalara and HRB. *Id.* at ¶ 22. The demand that Avalara is asking  
 26 the Court to impose on TechAtlantis would place the entire business at risk because it would  
 27

1 require significant new development efforts at extreme time and expense, during the busiest  
 2 time of the year for tax season. *Id.*; Singh Decl., ¶¶ 9-10; 14-17.

3 It appears that Avalara made promises to its clients that it would store their tax data in a  
 4 specific form and make it available to their client upon demand. The Agreement with  
 5 TechAtlantis gave Avalara six-months (which turned into an eight-month period with a one-  
 6 time extension of thirty-days) to access their clients' data and download it in the format that  
 7 they needed. Avalara appears to have decided not to do this work on behalf of its clients and is  
 8 now asking the Court to force TechAtlantis to do the work without compensation.

9 To comply with Avalara's demand would be at enormous expense to Tech Atlantis.  
 10 Tech Atlantis estimates the expense at approximately \$450,000, based on a cost estimate of  
 11 \$150,000 for manpower, \$100,000 for data hosting; and a \$200,000 loss in opportunity cost in  
 12 having to divert all its efforts away from its current business, all the while at risk of losing the  
 13 customers they are currently servicing. Singh Decl., ¶ 14. Avalara makes this demand, after  
 14 having already created a significant financial hardship in failing to pay the almost \$1 million it  
 15 owes to Tech Atlantis. Singh Decl., ¶ 13.

#### 16       **D.     Public Interest**

17 TechAtlantis agrees that there are customers that may not have reliable and quick access  
 18 to their 1099 forms that were created on the Avalara1099 system. This is not because  
 19 TechAtlantis is holding their data hostage, however. It is because either Avalara failed to  
 20 inform its clients that they should save copies of their forms or it promised to save forms for its  
 21 clients and failed to do so. In either scenario, TechAtlantis is not the party that made the  
 22 promises to Avalara's customers and should not be responsible for creating and sending  
 23 specific forms to each of Avalara's customers.

25 It is possible that Avalara did not create and save the forms for its customers because it  
 26 realized that it would be a labor-intensive process. As explained in the Sanjeev Singh  
 27

1 Declaration, as a result of the security measures inherent in the Avalara1099 system, all  
 2 customer data must be siloed in the system with no mechanism for collecting data across all  
 3 customer files. Singh Decl., ¶ 6. Thus, Avalara needed to inform its clients that they only had  
 4 six-months to login and download the forms they wanted or Avalara needed to log into each  
 5 customer's account and download the forms. That process was solely in Avalara's control, and  
 6 Tech Atlantis has no information regarding how or whether it notified its customers of the fact  
 7 that their access to Avalara1099 would be shut down. Pratt Decl., ¶ 17. The fact that Avalara  
 8 made the decision to forgo creating the forms it believed it needed to service its customers was  
 9 its own decision, and that decision has apparently created Avalara's problems with HRB.

10       If TechAtlantis is forced to comply with Avalara's demands, there is a serious risk that  
 11 client data could be compromised. Singh. Decl., ¶¶ 9-10. Producing the data in the form  
 12 demanded by HRB would require Tech Atlantis to dismantle the security systems that are in  
 13 place to prevent such a breach. *Id.*, at ¶ 9. It is not in the public interest to place the sensitive  
 14 tax information of Avalara1099 users at risk. The risk is also extremely prejudicial to Tech  
 15 Atlantis, because as the party performing the work, and potentially placing the data at risk, they  
 16 could incur significant liability for any resulting damage. *Id.*, at ¶ 17.

17           **E. Bond**

18       Avalara suggests that its requests for the return of the data is nothing more than turning  
 19 over AVA Data in its possession and therefore no bond is necessary. As discussed above, that  
 20 is not the case. Avalara is demanding, not the return of documents in Tech Atlantis's  
 21 possession, but the creation of documents and reports that do not exist, in a format that the  
 22 Avalara1099 system is currently incapable of producing. An estimate of the manpower, data  
 23 hosting, and lost opportunity is roughly \$450,000. Singh. Decl., ¶ 14. This estimate does not  
 24 include the potential liability risk associated with the required dismantling of Avalara1099's  
 25  
 26

1 security protocols. *Id.* at ¶ 9. Should the data be compromised the liability risk to Tech Atlantis  
 2 could be extreme. The estimate also does not include the very serious risk that the diversion of  
 3 all of TechAtlantis's resources to respond to Avalara's demands could put them out of  
 4 business. Pratt Decl., ¶ 22; Singh. Decl., ¶ 17. Should the Court grant Avalara's motion, a bond  
 5 for at least \$1,000,000 should be imposed to cover the associated costs and risk to  
 6 TechAtlantis.

#### 7 IV. CONCLUSION

8 Avalara's motion should be denied. As a threshold matter, Avalara seeks an injunction  
 9 based on a claim of replevin that has never been asserted. Because one cannot succeed on a  
 10 claim that was not plead, the Court need not consider the remaining preliminary injunction  
 11 elements. Assuming Avalara could overcome this drastic legal deficiency, replevin is not  
 12 possible as the property in question cannot be physically possessed nor can it be located and  
 13 turned over to the sheriff in the county. And, even if it could show likelihood of success on its  
 14 replevin claim, the equities do not favor Avalara. Avalara has not paid TechAtlantis, a much  
 15 smaller company, the money that TechAtlantis earned under their Agreement. It failed to act to  
 16 download customer data in the form it wanted during the Wind-Down Period or the thirty-day  
 17 window. And now claims that this is TechAtlantis's fault and TechAtlantis should be required  
 18 to do this work on behalf of Avalara's customers – without compensation. A mandatory  
 19 injunction of this nature would essentially put TechAtlantis out of business and reward Avalara  
 20 for its dilatory conduct and nonpayment of monies owed. Tech Atlantis respectfully requests  
 21 the motion be denied.

24 /

25 /

26 /

1 DATED: January 3, 2017

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1                           **CERTIFICATE OF SERVICE**  
2

3                           I hereby certify that on January 3, 2017, I electronically sent the foregoing to the  
4 following at the email designated below:

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19                          Dated: This 3<sup>rd</sup> day of January 2017.

20                          \_\_\_\_\_  
21                          /s/ *Michelle Peterson*  
22                          Michelle Peterson